

Purolator Courier Corp. and Communications Workers of America, AFL-CIO, Petitioner.
Case 12-RC-6939

November 30, 1990

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

On February 26, 1988, the Regional Director for Region 12 issued an Order Withdrawing Notice of Representation Hearing and Dismissing Petition. The Petitioner, which admits nonguards to membership, sought to represent a unit primarily composed of the Employer's "courier-guards." The Regional Director concluded that the "courier-guards" were guards within the meaning of Section 9(b)(3) of the Act based on prior *Purolator* cases¹ and, therefore, the Petitioner could not be certified as their representative.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's dismissal of the petition, contending that there were substantial issues of fact that warranted a hearing or, alternatively, that the Board should reconsider its policy in this area. The Employer filed an opposition brief. On May 10, 1988, the Board granted the Petitioner's request for review, reinstated the petition, and remanded the case to the Regional Director for a hearing.

In June 1988 a hearing was held before a hearing officer. On August 17, 1988, the Regional Director issued a Decision and Order in which he again found the instant courier-guards to be statutory guards because he concluded that the evidence established that their duties and functions were similar to those in the previous *Purolator* cases.²

Thereafter, on August 30, 1988, the Petitioner filed a timely request for review, contending that the Employer's employees in the petitioned-for unit are not guards, and that this case is distinguishable from prior *Purolator* cases. The Petitioner, again, alternatively urged the Board to reconsider its earlier decisions. The Employer filed an opposition brief. The Board granted the Petitioner's request for review by Order dated April 18, 1989. Thereafter, the Petitioner and the Em-

ployer each filed briefs in support of their positions. In addition, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO filed a brief as amicus curiae urging the Board to overrule precedent holding that courier-guards like those involved here are statutory guards. The Security Companies Organized for Legislative Action also filed a brief as amicus curiae in support of the Regional Director's Decision and Order.

The Board has considered the entire record in this case with respect to the issue on review and it has decided, for the reasons set out below, to reverse the Regional Director and find that the Employer's courier-guards are not guards within the meaning of Section 9(b)(3) of the Act.

I. FINDINGS OF FACT

The Employer is a Delaware corporation engaged in the transportation and delivery of various materials for customers nationwide. It operates through a network of air and ground transportation routes intended to provide next day delivery of packages.

The Employer's courier-guards³ are responsible for the pickup, transportation, and delivery of a wide variety of printed materials and common freight. Included among such items are various time-sensitive, valuable, or perishable materials. These include, inter alia, payroll checks, bank instruments, documents of title, securities, airline tickets, jewelry, art work, credit card receipts, Walt Disney World tickets, controlled pharmaceuticals, body parts, blood, biological specimens, sealed construction bids, architectural drawings, medical diagnostic data, computer equipment, telephone equipment, electronic equipment, cash letters, furs, flowers, live rats and mice, and dead animals.

Courier-guards wear distinctive uniforms and identification badges.⁴ Deliveries are made in vans, either leased or owned by the Employer, marked with the Employer's name. The Employer advertises itself in the Yellow Pages as a transport/delivery service.

A small portion of the courier-guards' pickups and deliveries are made to and from steel security

¹ *Purolator Courier Corp.*, 268 NLRB 452 (1983); *Purolator Courier Corp.*, 266 NLRB 384 (1983); *Purolator Courier Corp.*, 265 NLRB 659 (1982); and *Purolator Courier Corp.*, 254 NLRB 599 (1981).

² In view of this finding, the Regional Director made no determination whether the geographic scope of the unit should be limited to the four Florida facilities sought by the Petitioner—Miami, Boca Raton, Fort Pierce, and Fort Lauderdale—or whether it must be coextensive with the Employer's Florida region, as urged by the Employer. The Regional Director further found that, despite the Petitioner's willingness to represent any appropriate unit, the record provided no basis for making a unit determination as to the remaining classifications of mechanics and maintenance employees, because these classifications had been litigated only as they related to a unit composed primarily of courier-guards.

³ We find, in agreement with the Regional Director and the Petitioner, that the classification of courier-guard comprises those employees who perform pickups and deliveries, those who sort, and those who drive long routes between the Employer's facilities (line haul drivers). We also adopt the Regional Director's finding that "utility courier-guards" and "lead courier-guards" are included within this group as statutory employees within the meaning of Sec. 2(3) of the Act.

We note that the Employer, in response to a question raised by a driver as to why drivers were referred to as "courier-guards," indicated that the term "courier-guard" was used "for legal reasons."

⁴ As a result of a merger with Emery Air Freight in April 1988, the Employer is in the process of assimilating a significant number of new employees. The additional employees are sufficiently numerous that the Employer's uniform suppliers have temporarily been unable to meet the demand. As a result, some courier-guards have temporarily performed services in street clothes. This does not reflect a change in the Employer's policy that its courier-guards wear uniforms. We, in agreement with the Regional Director, do not find the temporary departure from this policy under these circumstances to be of significance.

“vaults,” provided by the Employer and located outside the customer’s premises. A courier-guard’s access to these vaults is by a master key given to the courier-guard by the dispatcher. Although the Employer presented testimony that the keys to the vaults are given back to the dispatcher at the end of the day, other testimony established that some courier-guards commonly keep the vault key on the keyring with the ignition key of the vehicle and have been instructed to leave the keys in the vehicle overnight.

In a very small number of cases, courier-guards at the request of a customer make an after-hours pickup or delivery inside a customer’s premises—normally an unoccupied hall or vestibule—using a key provided by the customer.⁵ These keys are generally returned to the dispatcher at the end of the day and locked up at night. If the facility is protected by a security device, the courier-guard may have to deactivate the device upon entering the premises and then reactivate it according to the customer’s instructions. The Employer provides on-the-job training, as needed; however, the record shows that courier-guards are seldom required to deactivate burglar alarms.

At the time of hire, the Employer verifies that courier-guards are bondable, although they are never actually bonded.⁶ Courier-guards are fingerprinted and photographed when hired and subject to a 90-day probationary period during which the Employer undertakes an extensive check of references and background. Courier-guards, however, may commence employment prior to the completion of this background check, subject to later termination.

Also upon hiring, the Employer distributes materials to its courier-guards that stress, among other things, the importance of security, the need for taking precautions when making a pickup or delivery, and the responsibility of the courier-guard for the truck and its contents. Employees sign acknowledgments of receipt of these materials. The Employer does not formally discuss the materials with the employees. The Employer provides, by contrast, formal classroom instruction on how to fill out a bill of lading. The employees also receive on-the-job training with respect to the var-

ious security functions and how to pick up and deliver customer packages.

Courier-guards are specifically instructed pursuant to company policy to lock their vehicles when unattended. The record shows, however, that, in practice, it is not uncommon for employees to keep the passenger side of the van unlocked in hot weather, because there is no air conditioning. One courier-guard testified that the lock on her vehicle was broken for 2 to 3 months, that she kept “begging” the Employer to fix it, and that it was never fixed. According to the Employer’s witnesses, courier-guards are also required pursuant to company policy to obtain signatures from customers upon delivery of packages, unless there is a signed document from the customer indicating that no signature is required. The Petitioner’s witnesses testified, however, that courier-guards have been instructed to, and do, leave packages in residential areas with neighbors when customers are not home. In other circumstances, courier-guards often leave packages in a secure place on the residential property when instructed to do so by the dispatcher.

Courier-guards are unarmed, and the Employer does not expect them to use any force to safeguard customers’ property; rather, they are instructed in their employee handbook to call the police or the company dispatcher if they observe any suspicious activity. There is also an 800-number in every terminal that an employee can call to give anonymous information concerning suspicious activity. The Petitioner’s witnesses testified, however, that they were not explicitly instructed to call the police to report suspicious occurrences. The Petitioner’s witnesses also testified that they are not required by the Employer to enforce against employees and other persons rules to protect the property of the Employer or to protect the safety of persons on the Employer’s premises. The courier-guards are never instructed to safeguard the premises of customers.

Although the Employer contends that it randomly stops courier-guards on their route to “audit” the packages by comparing the number of packages in the back of the delivery van to the number of packages on the delivery sheet, none of the courier-guards called by the Petitioner had ever been audited.

Two witnesses called by the Petitioner, now courier-guards for the Employer, previously were employed by the United Parcel Service (UPS), one for a period of 4 years in the latter 1970s and early 1980s as a driver and then manager, and one as a driver for several years in the early 1980s. The latter witness also worked for the United States Postal Service (Postal Service) for about 6 years, beginning in the mid-1970s. According to the uncontradicted testimony of these witnesses, the Employer, UPS, and the Postal Service all deliver the same range of items and have express

⁵ Both Employer and Petitioner witnesses testified concerning the portion of the courier-guards’ pickups and deliveries that involves vaults or access to a customer’s premises. The record also contains voluminous exhibits from the Employer that purport to be representative samples of courier-guard routes showing how many customers on each route require the use of a vault and/or customer keys. The Employer’s exhibits show varying numbers of vault and key stops on a number of routes within the Florida region. These representative samples, along with the testimony, indicate that the percentage of vault stops in the region ranges from less than 10 percent to about 25 percent, and that the percentage of key stops ranges from less than 7 percent to approximately 14 percent.

⁶ The Employer is self-insured through a separate corporate subsidiary, and if a customer claims that a courier-guard has violated the security of its product the Employer would pay the claim through its own internal insurance program if the allegation was found to be correct.

services guaranteeing next day delivery. Both the UPS and Postal Service use locked drop boxes, similar to the Employer's so-called vaults, which are usually located at street corners or parking lots, and both, like the Employer, expect their drivers to keep their vehicles locked. UPS drivers also are required to obtain customers' signatures, except that in residential areas they may exercise some discretion to leave packages without a signature if they follow certain procedures. Postal Service drivers are required to obtain signatures for insured, registered, certified, and express mail packages. With respect to security practices, UPS requires an extensive security check *before* the prospective employee commences employment and, according to the record, both UPS and Postal Service drivers are frequently audited to make sure that they are locking the doors of their vehicles and following security practices. With respect to training, UPS drivers spend 2 to 3 weeks with a supervisor for on-the-job training, and Postal Service employees receive 1 week of classroom training followed by 1 day of training on how to operate their vehicles and then 1-1/2 to 2 weeks of on-the-job training, or longer if necessary.

II. ANALYSIS

Section 9(b)(3) of the Act defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Originally, the Board limited this definition to the protection of money and valuables *of the employer*. *Brinks, Inc.*, 77 NLRB 1182 (1948). Thereafter, in *Armored Motor Service Co.*, 106 NLRB 1139 (1953), the Board overruled *Brinks* and extended the definition of guard to include armored drivers, finding that

[t]hese guards are obviously employed to protect property within the meaning of the statute, and, in view of the statutory language, we do not consider it controlling that the money and valuables which they protect belong not to their own employer but to a customer of their employer.

Id. at 1140. See also *Teamsters Local 639 (Dunbar Armored Express)*, 211 NLRB 687 (1974). Then, in *Brinks, Inc.*, 226 NLRB 1182 (1976), the Board extended the definition of guard even further to include *unarmed* courier-drivers, stating that "the only issue presented is whether the couriers here protect the property of the Employer's customers." *Id.* at 1183. See also *MDS Courier Service*, 248 NLRB 1320 (1980). Thereafter, the Board applied this standard in a series of *Purolator* cases, noted above at footnote 1, to determine whether *Purolator's* unarmed courier-drivers were statutory guards. Thus, in *Purolator Courier Corp.*, supra, 266 NLRB at 385, the Board stated that to be

a statutory guard those employees' basic function must involve "directly and substantially, the protection of valuable property of the Employer's customers." Accordingly, the issue here is whether the basic duties of the instant courier-guards focus on the *protection* of customer property so as to make these employees classifiable as guards under Section 9(b)(3).⁷

The extensive record in this case establishes that these courier-guards are not engaged directly and substantially in the protection of customer property, and therefore are not statutory guards. Instead, the record demonstrates that the Employer's courier-guards essentially function not as guards but as delivery drivers for the Employer's customers.

First, we note that the courier-guards' training and instruction regarding the safety of customers' property is minimal. The protective measures they are instructed to use include only such commonsense practices as locking their vehicles when unattended, turning in keys to vaults and customers' premises at the end of their workday, and obtaining customers' signatures when appropriate. Even these measures, however, are not always followed. For example, the record shows that courier-guards commonly leave the passenger side of their vehicles unlocked during hot summer weather and that a vehicle with a broken lock may go unfixed; and at least some courier-guards do not turn in their vault keys at the end of the day but instead leave them on their keyring in the ignition. The courier-guards' security training is limited to reading, on their own, various materials distributed to them by the Employer and a short period of on-the-job training.

The courier-guards are not trained or authorized to use weapons or force. They have no special training in avoiding risk or fending off theft, are unarmed, and are not expected by the Employer to use any force, lethal or nonlethal, to secure property in their possession.

Should the courier-guards observe suspicious activity, they are merely instructed in their employee handbook to call the police or their dispatcher, although Petitioner's witnesses testified that they are not even instructed to call the police. In this respect the courier-guards are not any different from any other employees in nonguard occupations who, during the course of the workday, would presumably report suspicious job-related activity to their employer or to the police.⁸ The

⁷ Although the test represents a slight departure from a literal reading of Sec. 9(b)(3), it nonetheless meets the statutory purpose of protecting property and persons. If a substantial function of the courier-guards is to protect customers' property, that function would of necessity include the protection of that property against all others and thus meet the 9(b)(3) requirement of enforcing against employees and other persons rules for the protection of such property. See, e.g., *Teamsters Local 639*, supra.

⁸ We recognize that in a number of cases the Board has held that when the employees in question otherwise meet the statutory requirement for guards, the fact that they do not take direct action against violators of company rules, but instead are merely instructed to report suspicious activity to a third party, will not defeat their guard status. See, e.g., *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983); *St. Regis Paper Co.*, 128 NLRB 550 (1960). Here,

courier-guards are never instructed to protect the customer's premises.

In addition, the courier-guards' job duties, as actually performed, merely involve the pickup, transport, and delivery of customer property. Although courier-guards are sometimes given keys to gain access to vaults and customer premises during nonbusiness hours, the vaults are outside the customer's premises and access to the premises is normally limited to vestibules and unoccupied hallways. Although the courier-guards are trained on the job on an "as needed" basis to deactivate and reactivate security devices located on customer premises, in practice they are seldom required to do so. The use of keys in both instances occurs only in a relatively small percentage of deliveries.⁹ Thus, these courier-guards' duties do not even arguably substantially involve the guarding of customers' premises.

The courier-guards' accountability to the Employer for the property involved is minimal. Courier-guards are not bonded and are permitted to work before their security clearances are completed. It does not appear that they are audited frequently.

Finally, the Employer holds itself out to the public as a delivery service, not a guard service. Consistent with this public image, the basic function of the courier-guards appears to be delivering items of varying degrees of value while exercising the same measure of care that a truckdriver or Postal Service employee would exercise in transporting items of analogous value.¹⁰

In sum, we find that the duties of the Employer's courier-guards are not characteristic of true guard status. The courier-guards receive only minimal training and instruction regarding the protection and safety of customer property; they are not trained or authorized to use physical force or weapons; they have job duties

that merely require the pickup, transport, and delivery of customer property with minimal access to customer premises; they are minimally accountable to the Employer for the property involved; and they are held out to the public by the Employer as delivery persons and not guards. Accordingly, we find the courier-guards are not guards within the meaning of Section 9(b)(3) of the Act as their basic function does not involve, directly and substantially, the protection of valuable property of the Employer's customers.¹¹

In finding these courier-guards are not guards, we note that in this record the courier-guards' function appears to be markedly similar to that of the UPS and Postal Service drivers who, to our knowledge, have never been considered guards. As one witness testified without contradiction, there is no substantial difference between her former job duties as a UPS driver and her job duties as a Purolator driver, "except that [in her opinion] UPS was a lot more strict." Indeed, the evidence in this record is that UPS and the Postal Service are in some respects stricter concerning security matters and appear to have provided more extensive driver training.

As we have found the Employer's courier-guards are not statutory guards, the Petitioner is not barred under Section 9(b)(3) from being certified as the bargaining representative of these employees. As indicated above, however, the Petitioner seeks to include other classifications of employees in the unit and to represent all the employees in a unit composed of only four Florida facilities rather than in a unit covering the Employer's entire Florida region, as urged by the Employer. The Regional Director made no determination concerning these unit scope and placement issues. Accordingly, the petition is reinstated, and the case is remanded to the Regional Director for a determination of all outstanding issues and the direction of an election, if appropriate, in an appropriate unit.

however, as shown *infra*, the courier-guards do not otherwise meet the statutory requirement for guards.

⁹In previous decisions concerning whether courier-guards are statutory guards, the Board placed great weight on whether the courier-guards had access to customer premises rather than analyzing the entire range of actual employee duties. In our view, however, access to customers' premises by key or other privileged means is only one consideration in ascertaining the Sec. 9 status of couriers, and its significance is largely dependent on what functions the couriers perform upon gaining access.

¹⁰Although the courier-guards may wear distinctive uniforms and identification badges, this is not dispositive of statutory guard status. Even though a courier-guard may be perceived by others as a guard because of uniforms and badges, such identification is insufficient without more to establish statutory guard status.

¹¹With respect to prior precedent, the Board recognizes that substantial growth and change have occurred in the guard as well as the courier industries since the 1947 enactment of Sec. 9(b)(3). Consequently, the Board has perceived a need to reexamine the standards used to determine the status of courier-guards under Sec. 9(b)(3). We stress that the analysis used in this case grows out of the standard articulated in prior cases and refers to factors mentioned in earlier cases. As noted in fn. 9, however, our analysis here differs from that in some previous cases in that we are treating access to customer property as one factor among others in determining guard status, and no one factor attains the status of a bright-line test. We also stress that the guard status of any specific unit of "courier-guards" is a question of fact that must be decided on the evidence presented in each case, consistent with our established standards.